

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THERESA SHORTMAN, individually and as the representative of a class of similarly-situated persons,

Case No.: 20-5410

Plaintiff,

V.

PRESS GANEY ASSOCIATES LLC, an Indiana limited liability company,

Defendant.

COMPLAINT—CLASS ACTION

DEMAND FOR JURY TRIAL

Plaintiff Theresa Shortman (“Plaintiff”), individually and on behalf of all others similarly situated, brings this Class Action Complaint (the “Complaint”) against Defendant, Press Ganey Associates LLC, (“Defendant”), and alleges, upon personal knowledge as to her own conduct, and upon information and belief as to the conduct of others, as follows:

INTRODUCTION

1. Plaintiff brings this Complaint against Defendant to secure redress because Defendant willfully violated the Telephone Consumer Protection Act, 47 U.S.C § 227, *et seq.*

1 ("TCPA" or "Act") and invaded Plaintiff's privacy by causing an unsolicited text message
2 to be made to Plaintiff's and other class members' cellular telephones through the use of an
3 auto-dialer, without prior written express consent.

4 2. The Defendant sent at least one unauthorized text message to Plaintiff's cell phone
5 using an automatic telephone dialing system ("ATDS") for the purpose of soliciting business
6 from Plaintiff. The Act states an "'automatic telephone dialing system' means equipment which
7 has the capacity—(A) to store or produce telephone numbers to be called, using a random or
8 sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1)(A)-(B).

9 3. The TCPA was enacted to protect consumers from unsolicited telephone calls and
10 unsolicited messages exactly like those alleged in this case. In response to Defendant's unlawful
11 conduct, Plaintiff seeks an injunction requiring Defendant to cease all sending unsolicited text
12 messages to consumers, and an award of statutory damages to the members of the Class under
13 the TCPA equal to \$500.00 per violation, together with court costs, prejudgment interest, and
14 treble damages (for knowing and/or willful violations).

JURISDICTION AND VENUE

16 4. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 as this action
17 arises under the TCPA, a federal statute.

18 5. The Court has personal jurisdiction over Defendant because it conducts
19 significant business in this District, and the unlawful conduct alleged in this Complaint occurred
20 in this District.

21 6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
22 1331 and 47 U.S.C. § 227 because this case involves federal questions.

23 7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the
24 wrongful conduct giving rise to this case occurred in this District.

PARTIES

8 Plaintiff Theresa Shortman is a citizen of Washington

9. Defendant, Press Ganey Associates LLC, is an Indiana limited liability company with its principal place of business in South Bend, Indiana.

10. Whenever in this Complaint it is alleged that Defendant committed any act or omission it is meant that Defendant's members, managers, employees, and/or agents committed such act or omission and that at the time such act or omission was committed, it was done with the full authorization, ratification or approval of Defendant or was done in the routine normal course and scope of employment of Defendant's members, managers, employees, and agents.

LEGAL BASIS FOR THE CLAIMS

11. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In doing so, Congress recognized that “[u]nrestricted telemarketing ... can be an intrusive invasion of privacy....” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 § 2(5) (1991) (codified at 47 U.S.C. § 227).

12. Specifically, the TCPA restricts telephone solicitations (i.e., telemarketing) and the use of automated telephone equipment. The TCPA limits the use of automatic dialing systems, and SMS text messages. It also specifies several technical requirements for autodialers and voice messaging systems - principally with provisions requiring identification and contact information of the entity using the device to be contained in the message.

13. All ATDS calls to wireless numbers violate the TCPA if the calling party does not first obtain express written consent from the called party.

14. As of October 16, 2013, unless the recipient has given prior express written consent, the TCPA and Federal Communications Commission ("FCC") rules under the TCPA generally:

- a. Prohibit solicitors from calling residences before 8 a.m. or after 9 p.m., local time.

- b. Require that solicitors provide their name, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which that person or entity may be contacted.
- c. Prohibit solicitations to residences that use an artificial voice or a recording.
- d. Prohibit any call made using automated telephone equipment or an artificial or prerecorded voice to a wireless device or cellular telephone.
- e. Prohibit any call made using automated telephone equipment or an artificial or prerecorded voice to a wireless device or cellular telephone, or any service for which the recipient is charged for the call.

15. Prior express written consent means “an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.” 47 C.F.R. § 64.1200(f)(8).

16. An entity can be liable under the TCPA for a call made on its behalf, even if the entity did not directly place the call. Under those circumstances, the entity is deemed to have initiated the call through the person or entity making the call on its behalf.

COMMON FACTUAL ALLEGATIONS

17. Unfortunately for consumers, Defendant utilized (and continues to utilize) a sophisticated telephone dialing system to send text messages to individuals *en masse* promoting its services. On information and belief, Defendant obtained these telephone numbers (i.e., leads) by purchasing marketing lists containing consumers' telephone numbers.

18. In Defendant's overzealous attempt to market its services, it sends (and continues to send) text messages to consumers who never provided consent and to consumers having no relationship with Defendant. Defendant knowingly sent (and continues to send) this text message

1 without the prior express written consent of the text recipients. As such, Defendant not only
 2 invaded the personal privacy of Plaintiff and members of the Class, but also intentionally and
 3 repeatedly violated the TCPA.

4 19. On or about December 27, 2019, Defendant sent Plaintiff a text message on her
 5 cellular telephone number via ATDS, as defined by 47 U.S.C. § 227(a)(1) without first obtaining
 6 Plaintiff's written consent.

7 20. Plaintiff is the exclusive user of the cellular telephone that Defendant sent the text
 8 message to.

9 21. Defendant's text message to Plaintiff constituted a call that was not for emergency
 10 purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

11 22. Plaintiff did not provide Defendant with prior express written consent to receive
 12 text messages to her cellular telephone utilizing an ATDS, pursuant to 47 U.S.C. § 227 (b)(1)(A).

13 23. Defendant's text message which utilized an ATDS invaded Plaintiff's privacy and
 14 violated 47 U.S.C. § 227(b)(1).

15 24. Plaintiff has reason to believe Defendant has sent, and continues to send, calls to
 16 thousands of wireless telephone consumers to market its services without consent required by the
 17 TCPA.

18 25. In order to redress injuries caused by Defendant's violations of the TCPA,
 19 Plaintiff, on behalf of herself and a class of similarly situated individuals, brings suit under the
 20 TCPA, 47 U.S.C. § 227, et seq., which prohibits certain unsolicited text calls to cell phones.

21 26. On behalf of Plaintiff and the Class, Plaintiff seeks an injunction requiring
 22 Defendant to cease all wireless telemarketing activities and an award of statutory damages to the
 23 Class members, together with prejudgment interests, and costs.

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1 CLASS ACTION ALLEGATIONS
23 **COUNT I**
4 **VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
5 **47 U.S.C. § 227 FOR THE USE OF AN ATDS**6 27. Plaintiff restates, re-alleges and incorporates by reference each preceding
7 paragraph as though fully set forth herein.8 28. Defendant sent unsolicited and unauthorized text messages using an ATDS to
9 Plaintiff's and the Class members' cellular telephones for the purpose of marketing products
10 and/or services to Plaintiff and the Class.11 29. Plaintiff sent the text messages without obtaining prior express written consent
12 from Plaintiff and the Class.13 30. The foregoing acts and omissions of Defendant constitute numerous and multiple
14 violations of the TCPA, including but not limited to each and every one of the above-cited
15 provisions of 47 U.S.C. § 227, *et seq.*

16 31. Defendant's conduct invaded Plaintiff's privacy.

17 32. As a result of Defendant's violations of 47 U.S.C. § 227, *et seq.*, Plaintiff and the
18 Class are entitled to an award of \$500.00 in statutory damages, for each and every violation,
19 pursuant to 47 U.S.C. § 227(b)(3)(B).20 33. Because Defendant had knowledge that Plaintiff and the Class did not consent to
21 the receipt of the aforementioned telephone solicitations, and Defendant knowingly and
22 intentionally made the telephone solicitations to Plaintiff, the Court should, pursuant to 47 U.S.C.
23 § 227(b)(3)(C), treble the amount of statutory damages recoverable by Plaintiff and the Class.24 34. Plaintiff and the class are also entitled to and seek injunctive relief prohibiting
25 such conduct in the future.26 35. Plaintiff brings this action pursuant to Rule 23(a), Rule 23(b)(2), and Rule
27 23(b)(3) of the Federal Rules of Civil Procedure individually and on behalf of:

1 All persons in the United States who received a text message sent by or on behalf
2 of Defendant to the individual's cellular telephone through the use of an
3 automatic telephone dialing system, or any other device having the capacity to
4 dial numbers without human intervention, from four years prior to the date of
5 filing of this Complaint until the date Defendant's conduct ceases, where the text
6 message(s) were sent without prior express written consent from the recipient to
7 make such call.

8 Excluded from the class are employees and agents of Defendant as well as members of
9 the judiciary.

10 36. Plaintiff reserves the right to modify the class definition as the contours and
11 parameters of the class become apparent through discovery in this matter.

12 37. Plaintiff and the Class members were harmed by Defendant's acts in at least the
13 following ways: Defendant, either directly or through its agents, illegally contacted Plaintiff and
14 the Class via their cellular telephones by using an ATDS, thereby causing Plaintiff and the Class
15 to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff
16 and the Class members previously paid; and Plaintiff and Class members' privacy was invaded.

17 38. The exact size of the Class is presently unknown but can be ascertained through
18 a review of Defendant's records or those records of vendors hired by Defendant to send the texts
19 messages, and it is clear that individual joinder is impracticable. On information and belief
20 Defendant made telephone calls to thousands of consumers who fall within the definition of the
21 Class.

22 39. There are many questions of law and fact common to the claims of Plaintiff and
23 the Class, and those questions predominate over any questions that may affect individual
24 members of the Class.

25 40. Common questions for the Class include, without limitation:

26 a. Whether Defendant's conduct violated the TCPA;
27 b. Whether Defendant systematically sent text messages to consumers who
did not previously provide Defendant and/or its agents with prior express written
consent to receive such text messages;

- 1 c. Whether Class members are entitled to treble damages based on the
- 2 willfulness of Defendant's conduct;
- 3 d. Whether Defendant systematically sent text messages to consumers using
- 4 any automatic dialing system to any telephone number assigned to a cellular
- 5 phone service without prior express written consent of the called party; and
- 6 e. Whether Defendant and its agents should be enjoined from engaging in
- 7 such conduct in the future.

8 41. Plaintiff's claims are typical of the claims of the other members of the Class.
9 Plaintiff and the Class sustained damages as a result of Defendant's uniform wrongful conduct
10 during transactions with Plaintiff and the Class.

11 42. Plaintiff will fairly and adequately represent and protect the interests of the Class
12 and has retained counsel competent and experienced in complex class actions.

13 43. Plaintiff has no interests antagonistic to those of the Class, and Defendant has no
14 defenses unique to Plaintiff.

15 44. This class action is appropriate for class certification because Defendant has acted
16 or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the
17 Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class
18 and making an award of damages and final injunctive relief appropriate with respect to the Class
19 as a whole.

20 45. Defendant's practices challenged herein apply to and affect the Class members
21 uniformly, and Plaintiff's challenge of those practices hinges on Defendant's conduct with
22 respect to the Class as a whole, not on facts or law applicable only to Plaintiff.

23 46. This case is also appropriate for class certification because class proceedings are
24 superior to all other available methods for the fair and efficient adjudication of this controversy
25 given that joinder of all parties is impracticable.

47. The damages suffered by the individual members of the Class will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's actions.

48. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Defendant's misconduct.

49. Even if members of the Class could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in this Complaint.

50. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Economies of time, effort and expense will be fostered, and uniformity of decisions ensured.

COUNT II UNSUBMITTED TEXT MESSAGES

51. Plaintiff restates, re-alleges and incorporates by reference paragraphs 1 through
27 as though fully set forth herein.

52. On or about December 27, 2019, Plaintiff received a text messages ("Text") on her cellular telephone stating "The Care Team at MultiCare Health System values your feedback. Please take a short survey. <https://pgsms.co/h6v6x3y3hf3n5k5g>." A true and correct copy of the screen shot of the Text is attached hereto as Exhibit A.

53. Plaintiff is informed and believes, upon such information and belief avers, that Defendant sent text messages to consumers *en masse*.

54. The texts are advertisements of Defendant's services containing automated content.

55. On information and belief, Defendant sent or transmitted, or had sent or transmitted on its behalf, the Text to Plaintiff's cellular telephone using an automatic telephone

1 dialing system as defined by 47 U.S.C. § 227(b)(1)(A) and the FCC. Defendant's system placed
 2 the Text to Plaintiff automatically, using a list or database of telephone numbers, and dialing
 3 without human intervention.

4 56. Plaintiff never requested, desired, permitted, or otherwise provided her prior
 5 express consent to Defendant to send or transmit the Text or any other texts to her cellular
 6 telephone.

7 57. Plaintiff never provided her prior express written consent to Defendant to send or
 8 transmit the Text or any other advertisements or telemarketing to her cellular telephone.

9 58. As a result of receiving the Text, Plaintiff wasted data storage capacity, suffered
 10 the nuisance, waste of time, and aggravation that accompanies receipt of such unauthorized
 11 advertisements, and was subjected to an intrusion upon seclusion and invasion of privacy.

12 59. On information and belief, Defendant sent the Text, or substantially similar text
 13 messages, *en masse* to a list of thousands of randomly generated cellular telephone numbers using
 14 an automatic telephone dialing system.

15 60. On information and belief, Defendant sent text messages to the Class members
 16 using equipment that had the capacity to store or produce telephone numbers to be called using
 17 a random or sequential number generator, and to dial such numbers without human intervention.

18 61. On information and belief, the Class members did not provide Defendant with
 19 prior express written consent to receive such text messages and, as a result, incurred expenses to
 20 their wireless services, wasted data storage capacity, suffered the aggravation that accompanies
 21 receipt of such unauthorized advertisements, and were subjected to an intrusion upon seclusion.

22 62. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3), Plaintiff brings this class action on
 23 behalf of the following Class:

24 All persons or entities who, within the four years prior to the filing of the
 25 instant Complaint, received a non-emergency, unauthorized text message to
 26 their cellular telephones from Defendant through the use of an automatic
 27 dialing system and who did not provide prior express consent and/or prior
 express written consent to receive such text messages.

1 Excluded from the Class are the Defendant and its employees, agents and members of the
2 Judiciary.

3 63. Plaintiff reserves the right to amend the class definition as discovery reveals the
4 shape and contours of the class.

5 64. The exact size of the Class is presently unknown but can be identified through a
6 review of Defendant's records and records of Defendant's vendors and it is clear that individual
7 joinder of all members is impracticable. Plaintiff is informed and believes, and upon such
8 information and belief avers, that the number of Class members is at least forty (40) based on
9 Defendant's use of automated text message content.

10 65. Plaintiff's claims are typical of the claims of all Class members. Plaintiff received
11 the same or substantially similar unsolicited text message as the other Class members sent by or
12 on behalf of Defendant advertising goods and services of the Defendant during the Class Period.
13 Plaintiff is making the same claims and seeking the same relief for itself and all Class members
14 based upon the same federal statute.

15 66. Plaintiff will fairly and adequately represent and protect the interests of the class.
16 Plaintiff is interested in this matter, has no conflicts, and has retained experienced class counsel
17 to represent the class.

18 67. Common questions of law and fact predominate over any questions affecting only
19 individual members, and a class action is superior to other methods for the fair and efficient
20 adjudication of the controversy because:

21 a. Proof of Plaintiff's claims will also prove the claims of the Class without the
22 need for separate or individualized proceedings;

23 b. Evidence regarding defenses or any exceptions to liability that Defendant may
24 assert and attempt to prove will come from Defendant's records and will not
25 require individualized or separate inquiries or proceedings;

- c. Defendant has acted and is continuing to act pursuant to common policies or practices in the same or similar manner with respect to all Class members;
- d. The amount likely to be recovered by individual Class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one proceeding based upon common proofs; and
- e. The case is inherently manageable as a class action in that:
 - i. Defendant identified persons or entities to receive the unauthorized text messages and Defendant's computer and business records will likely enable Plaintiff to readily identify class members and establish liability and damages;
 - ii. Liability and damages can be established for Plaintiff and the Class with the same common proofs;
 - iii. Statutory damages are provided for in the statute and are the same for all Class members and can be calculated in the same or a similar manner;
 - iv. A class action will result in an orderly and expeditious administration of claims and it will foster economics of time, effort, and expense;
 - v. A class action will contribute to uniformity of decisions concerning Defendant's practices; and
 - vi. As a practical matter, the claims of the Class are likely to go unaddressed absent class certification.

68. The text Defendant sent Plaintiff is an advertisement as defined by 47 C.F.R. § 64.1200(f)(1) because they promote Defendant's services.

69. Defendant and/or its agents sent the Text, or substantially similar unsolicited automated text messages to the cellular telephone number of Plaintiff and the other Class members *en masse* without their prior express consent and prior express written consent.

70. Defendant sent the text messages, or had them sent on its behalf, using an automatic telephone dialing system or device which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers.

71. Defendant utilized equipment that sent the text messages to Plaintiff and other Class members simultaneously and without human intervention.

72. By sending the unsolicited text messages to Plaintiff and the Class, Defendant violated 47 U.S.C. § 227(b)(1)(A)(iii).

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Theresa Shortman, individually and on behalf of the Class, respectfully requests the following relief against Defendant, Press Ganey Associates, LLC:

- a. An order certifying this matter as a class action with Plaintiff as Class Representative, and designating Anderson + Wanca as lead Class Counsel;
- b. An award of statutory damages for each and every negligent violation to each member of the Class pursuant to 47 U.S.C. § 227(b)(3)(B);
- c. An award of statutory damages for each and every knowing and/or willful violation to each member of the Class pursuant to 47 C.F.R. § 64.1200;
- d. Injunctive relief prohibiting the Defendant's conduct complained of herein, pursuant to 47 U.S.C. § 227(b)(3)(A); and

e. For such other and further relief as the Court deems necessary, just, and proper.

Respectfully submitted,

THERESA SHORTMAN, individually and as the representative of a class of similarly-situated persons

By: s/ Walter Smith

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